84-457

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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1984

MORTON L. MINSKY, Individually and on behalf of all others similarly situated,

Petitioner,

vs.

AUTO DRIVEAWAY COMPANY, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARK R. ORDOWER
MARK R. ORDOWER & ASSOCIATES
435 North LaSalle Street
Chicago, Illinois 60610
312/822-0008

ROBERT A. HOLSTEIN
HOLSTEIN, MACK & ASSOCIATES
30 North LaSalle Street
Chicago, Illinois 60602
312/641-3400

KENNETH R. SIEGAN
JOEL D. WEISMAN
SIEGAN & WEISMAN, LTD.
33 North Dearborn Street
Chicago, Illinois 60602
312/782-1212

FREDERIC F. BRACE, JR., P.C.
BRACE & O'DONNELL
332 South Michigan Avenue
Chicago, Illinois 60604
312/347-4400

Attorneys for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

26 pp

QUESTIONS PRESENTED

1. Can defendants who have been adjudicated guilty of a criminal price-fixing conspiracy escape civil antitrust liability under *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922)? (Discussed *infra.*, pp. 4-5)

2. Does *Keogh* apply to rates which were fraudulently filed with and never even considered by the Interstate Commerce Commission? (Discussed, *infra.*, pp. 5-6)

3. Does *Keogh* survive post-1922 changes in the legal environment, including the substitution of competition for regulation and limitation of the ICC's authority to approve collective rate-making agreements? (Discussed *infra.*, pp. 7-10)

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	i
Statement Of The Case	2
Statutes Involved	2
Reasons For Granting The Writ	4
1. Defendants Who Have Been Adjudicated Guilty Of A Criminal Price-Fixing Conspiracy Cannot Escape Civil Antitrust Liability Under *Keogh*.	4
2. *Keogh* Does Not Apply To Rates Which Were Fraudulently Filed With And Never Even Considered By The Interstate Commerce Commission.	5
3. *Keogh* Does Not Survive Post-1922 Changes In The Legal Environment, Including The Substitution Of Competition For Regulation And Limitation Of The ICC's Authority To Approve Collective Rate-Making Agreements.	7
Conclusion	11
Appendix:	
A. Opinion of District Court	A1
B. Opinion of Court of Appeals	A2
C. Statutes	A7

TABLE OF AUTHORITIES

PAGE

CASES:

Bigelow v. *RKO Pictures, Inc., et al.*, 327 U.S. 251 (1946) 10

California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 5

Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976) 6

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) 7, 8, 9, 10

Keogh v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922) 3, 4, 5, 6, 7, 8, 9, 10

Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 5

Phonotele, Inc. v. *American Telephone & Telegraph Co.*, 664 F.2d 716 (9th Cir. 1981) 6

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 9

Story Parchment v. *Paterson Parchment Co.*, 282 U.S. 555 (1931) 10

United States v. *Borden Co.*, 308 U.S. 188 (1939) 7

STATUTES:

Clayton Act, 38 Stat. 731, 15 U.S.C. § 15 ..... 2, 3

Federal Rules of Civil Procedure (28 U.S.C.)
Rule 23 9

Interstate Commerce Act (49 U.S.C.)
Section 5(b) 2, 7
Section 10706(b)(2) 2, 3, 5, 7
Section 10713 8

PAGE

Sherman Act (15 U.S.C.)
Section 1 3
Section 2 3

Shipping Act of 1916 (46 U.S.C.)
Sections 801-842 8

ARTICLE:

F. Kahn, *Keogh's Kaput*, 48 I.C.C. Practitioner's Journal 478 (1982) 8

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Morton L. Minsky prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on April 18, 1984. A petition for rehearing was denied on June 11, 1984.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District Court is in the form of a minute order dated May 24, 1982. The District Court's minute order is not reported and is printed in the Appendix, *infra.*, at page A1.

The memorandum opinion of the Court of Appeals appears in the Appendix, *infra.*, beginning at page A2. The opinion was originally unreported, but the Court of Appeals subsequently granted a motion that it be issued as a fully citable opinion. That opinion has yet to be reported.

JURISDICTION

The judgment of the Courts of Appeals for the Seventh Circuit was entered on April 18, 1984, and a petition for rehearing was denied on June 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, printed in the Appendix, at page A7.

Section 5a of the Reed-Bulwinkle Act, 62 Stat. 472, 49 U.S.C. § 5b, printed in the Appendix, at page A7.

Section 5a of the Interstate Commerce Act, 90 Stat. 42, 49 U.S.C. § 10706(b)(2), printed in the Appendix, at page A8.

STATEMENT OF THE CASE

Respondents-defendants Auto Driveaway Co., AAAcon Auto Transport Inc., and Nationwide Auto Transporters, Inc., are engaged in the "casual driveaway" industry: they arrange for vehicles to be driven from one location to another by "casual" or nonprofessional drivers. As members of the Automotive Carriers Association ("Association") defendants submitted to the Interstate Commerce Commission ("ICC") a proposal for collective rate-making by the Association pursuant to Section 5a

of the Interstate Commerce Act, 90 Stat. 42, 49 U.S.C. § 10706(b). See Appendix, p. A8. Although this application was denied by the ICC, defendants collectively fixed their rates and filed them with the ICC, fraudulently representing that the rates had been established individually. Because the ICC took no action on those rates, they automatically became effective thirty days after submission.

Defendants' fraud was discovered and they were indicted by a federal grand jury for engaging in a combination and conspiracy to fix, raise, stabilize, and maintain rates. Defendant AAAcon pleaded *nolo contendere,* Nationwide pleaded guilty, and Auto Driveaway was tried by a grand jury and found guilty.

Petitioner-plaintiff Morton L. Minsky filed a consumer class action for treble damages under Sections 1 and 2 of the Sherman Act, 69 Stat. 282, 15 U.S.C. §§ 1 and 2, and Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, see Appendix, p. A7, based on defendants' adjudicated criminal antitrust violations. The district court dismissed the action, stating that plaintiff had no legal right to a rate lower than the one which had been fraudulently filed with the ICC, relying on *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922). The United States Court of Appeals for the Seventh Circuit affirmed *per curiam* on April 18, 1984. Petition for rehearing was denied on June 11, 1984.

REASONS FOR GRANTING THE WRIT

1. Defendants Who Have Been Adjudicated Guilty Of A Criminal Price-Fixing Conspiracy Cannot Escape Civil Antitrust Liability under *Keogh*.

Keogh v. *Chicago & Northwestern Railway Co.*, 250 U.S. 156 (1922), involved a collateral attack upon rates which had been approved by the ICC after extensive hearings; the instant case does not.

In *Keogh*, the defendant railroads formed an association, agreed upon uniform rates, and submitted those rates to the ICC. Keogh, a shipper, complained to the ICC that the rates were arbitrary and unreasonable. After conducting extensive hearings, in which Keogh participated, the ICC approved the rates. Keogh then filed a federal antitrust action, alleging that the association's collective rate-making injured him by causing an increase in his rates. The district court entered judgment for the defendants, which was affirmed by the Court of Appeals and this Court.

In *Keogh*, the plaintiff made a collateral attack upon rates which had been approved by the ICC. This Court stressed the fact that "the rates complained of [had] been found by the Commission to be legal . . ." 260 U.S. at 162. The case was presented on the pleadings, and the pleadings established the fact that:

> [E]very rate complained of had been duly filed by the several carriers with the Interstate Commerce Commission; that upon such filing the rates had been suspended for investigation, upon complaint of Keogh, pursuant to the Act to Regulate Commerce, February

> 4, 1887, c. 104, 24 Stat. 379, 384, as amended; that after extensive hearings, in which Keogh participated, the rates were approved by the Commission; and that they were not made effective until after they had been so approved.

260 U.S. at 160.

The instant case does not involve a collateral attack upon an ICC determination. The rates submitted by the defendants were fraudulently filed. Whereas in *Keogh* the defendants complied fully with the regulatory procedures, the defendants in this case fraudulently violated those procedures. The Interstate Commerce Act specifies how carriers may seek approval of joint rate-making agreements. 90 Stat. 42, 49 U.S.C. § 10706(b)(2). See Appendix, p. A8. Defendants attempted to obtain such approval, but permission was denied. Defendants set their rates collectively anyway, but fraudulently represented that the rates had been established individually. The regulatory process which defendants have abused should not protect the abusive conduct from antitrust scrutiny. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973).

Therefore, *Keogh* does not control the instant dispute because there is no collateral attack upon an ICC determination.

2. *Keogh* Does Not Apply To Rates Which Were Fraudulently Filed With And Never Even Considered By The Interstate Commerce Commission.

The rates involved in the instant case were not "approved" by the ICC as was the case in *Keogh*. Defen-

dants' conspiratorial rates were filed fraudulently, but after thirty days they became effective automatically. This process hardly resembles the ICC "approval" which was present in *Keogh*. The obvious distinction between rates which are expressly approved and rates which become effective automatically has been recognized by lower courts. See *e.g. Phonotele, Inc.* v. *American Telephone & Telegraph Co.*, 664 F.2d 716, 733 (9th Cir. 1981).

A similar distinction was made in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). The Court held that the mere approval of a tariff by a state regulatory agency was insufficient "state action" to confer antitrust immunity on all conduct related to the tariff. In *Cantor*, a retailer who sold light bulbs challenged the utility's program of supplying free light bulbs to its customers. The utility defended on the ground that the program was financed by a tariff which had been approved by a state regulatory agency, and that the program was exempt from antitrust scrutiny under the "state action" doctrine. This defense was rejected on the basis that the conduct was not compelled by the state merely because the tariff was approved. *Id.* at 592-93. The facts of the instant case present an even stronger reason to subject defendant's rates to antitrust scrutiny in that they were not even approved by the Commission, as in *Cantor*, but automatically became effective with the passage of time.

Whereas judicial deference to rates which are approved by a regulatory agency can be justified, blind judicial deference to rates which were fraudulently filed cannot be justified. The petition for certiorari should be granted so that it may be determined whether the *Keogh* decision is so broad as to cover the instant facts.

3. *Keogh* Does Not Survive Post-1922 Changes In The Legal Environment, Including The Substitution Of Competition For Regulation And Limitation Of The ICC's Authority To Approve Collective Rate-Making Agreements.

The 1922 *Keogh* decision reconciled the Interstate Commerce Act (then known as the Act to Regulate Commerce) and the Sherman Act. The Court disallowed the private action for damages under the antitrust laws "because otherwise the paramount purpose of Congress — prevention of unjust discrimination — might be defeated." 260 U.S. at 163. Subsequent changes in regulatory and antitrust law indicate that the factors which supported the *Keogh* decision are no longer valid.

Congressional policy since *Keogh* has placed greater emphasis on competition and less emphasis on regulatory oversight. In 1922, when *Keogh* was decided, there was no limitation on the ICC's authority to confer antitrust immunity. In 1948, however, Congress passed the Reed-Bulwinkle Act, which established an *exclusive* method by which carriers would submit joint rate-making agreements to the ICC. 69 Stat. 472, 49 U.S.C. § 5b. See Appendix, p. A7. (Now 90 Stat. 42, 49 U.S.C. § 10706 (b). See Appendix, p. A8) The creation of an antitrust exemption for certain rate-making activities implies that rate-making activities outside the exemption are actionable. *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966).

The regulatory authority of the ICC was also drastically curtailed in 1980, when the Staggers Rail Act was passed, 94 Stat. 1895, 49 U.S.C. § 10101 *et seq.* That Act authorized private contract railroad rates, removed such

rates from the jurisdiction of the ICC and made them subject to the antitrust laws. 94, Stat. 1908, 49 U.S.C. § 10713. The effect is that railroad shippers cannot now contest the reasonableness of those rates before the ICC, even if the rates are collusively set. See Kahn, *Keogh's Kaput,* 48 I.C.C. Practitioner's Journal 478 (1982). The Staggers Act applies only to railroads, but nevertheless exemplifies the shift in Congressional policy toward limiting regulated carriers' antitrust exemption.

This Court's 1966 interpretation of the Shipping Act of 1916, 75 Stat. 762, 46 U.S.C. §§ 801-842, is another example. The Shipping Act exempts from antitrust liability rate-setting agreements approved by the Federal Maritime Commission, just as the Interstate Commerce Act exempts such agreements if they are approved by the ICC. A private party's right to recover treble damages under the antitrust laws for conduct which violates the Shipping Act is "entirely collateral" to rights available under the Act. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 222, 224 (1966). Now that ICC purview over anticompetitive conduct has been carefully circumscribed in the Interstate Commerce Act, rights arising under the antitrust laws should also be considered collateral to rights contained in the Interstate Commerce Act.

In *Keogh,* the Court also believed that the recovery of antitrust damages would be contrary to the regulatory goal of preventing unjust discrimination. 260 U.S. at 163. The Court stated that it was "highly improbable" that the juries and courts who would hear the cases of various shippers would grant the same relief. Non-uniform rates would operate to give preference to some shippers over others. This analysis is no longer valid for three reasons.

First, the Court specifically rejected this argument in *Carnation Co.* v. *Pacific Westbound Conference, supra.* There, respondent argued that antitrust damages would be contrary to the policy against discrimination contained in the Shipping Act of 1916. The Court stated that "[w]e believe that Congress was concerned with assuring equality of treatment by the conferences, not with equality of treatment by juries in collateral proceedings." 383 U.S. at 219 n.3. Second, the problem of non-uniform recoveries is solved by Rule 23, *Federal Rules of Civil Procedure.* Rule 23 states that class actions are appropriate where "(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications. . . ." Third, the concern for equality among competing shippers does not apply to the instant case. Minsky and the class he seeks to represent are ultimate consumers of defendants' services, and compete with neither defendants nor each other. As consumers, they are nonetheless entitled to damages for violations of the antitrust laws. *Reiter* v. *Sonotone Corp.,* 442 U.S. 330 (1979). Thus, the Court's concern in *Keogh* that the recovery of antitrust damages would be contrary to the Interstate Commerce Act is inapplicable to Minsky's action.

Another reason the Court gave for disallowing the private antitrust action in *Keogh* was that proof of antitrust damages would require input from the ICC, which could not be obtained in a lawsuit. The Court stated that the plaintiff would have to prove that, but for the illegal conspiracy, he would have been charged a lower rate. This hypothetical lower rate would have to conform to the Act to Regulate Commerce, reasoned the Court, but only

the ICC could make such a determination. Subsequent to *Keogh,* however, this Court has abandoned the notion that proof of antitrust damages requires regulatory input. Courts may determine what rates the plaintiff would have been charged but for the conspiracy. *Carnation Co.* v. *Pacific Westbound Conference, supra,* 383 U.S. at 222.

Finally, in *Keogh* the Court stated that Keogh could not recover damages because the damages alleged were "purely speculative." 260 U.S. at 164-65. Since *Keogh,* courts have become more lenient in their treatment of antitrust damages. In *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 565 (1931), and *Bigelow* v. *RKO Pictures, Inc.,* 327 U.S. 251, 265 (1946), the Court stated that defendants should bear the risk of uncertainty which their conduct produces. In light of the modern judicial attitude toward antitrust damages, plaintiff should be given at least an opportunity to prove properly recoverable damages.

CONCLUSION

The defendants engaged in a criminal price-fixing conspiracy, and nothing within the Interstate Commerce Act exempts that conduct from antitrust scrutiny. Plaintiff and the class of consumers he seeks to represent should be allowed to sue for damages for injuries inflicted by the price-fixing conspiracy.

This petition for a writ of certiorari should be granted.

MARK R. ORDOWER
MARK R. ORDOWER
& ASSOCIATES
435 North LaSalle Street
Chicago, Illinois 60610
312/822-0008

ROBERT A. HOLSTEIN
HOLSTEIN, MACK
& ASSOCIATES
30 North LaSalle Street
Chicago, Illinois 60602
312/641-3400

KENNETH R. SIEGAN
JOEL D. WEISMAN
SIEGAN & WEISMAN, LTD.
33 North Dearborn Street
Chicago, Illinois 60602
312/782-1212

FREDERIC F. BRACE, JR., P.C.
BRACE & O'DONNELL
332 South Michigan Avenue
Chicago, Illinois 60604
312/347-4400

Attorneys for Petitioner

APPENDIX

APPENDIX

Name of Presiding Judge,
Honorable Getzendanner

Cause No. 81 C 5165 Date May 24, 1982

Title of Cause
Minsky v. Auto Driveaway Co.

Brief Statement of Motion
Defendants' Motion to Dismiss

The court grants defendants' motion to dismiss for faliure to state a claim upon which relief may be granted. (Defendants erroneously entitle their motion one to dismiss for want of jurisdiction, cf. McLain v. Real Estate Board of New Orleans, Inc., 100 S.Ct. 502, 510 (1980).) Plaintiff has not and cannot show that he has any legal right to a rate lower than that approved by the ICC. In the absence of a legal right, there is no legal injury. See Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922), and Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1944); Monticello Heights, Inc. v. Morgan Drive Away, Inc., [1974] CCH Trade Cases ¶75,282 (S.D.N.Y. 1974). Plaintiff's cited cases, dealing with the state action exemption to the antitrust laws, are inapposite here.

Docketed May 26, 1982

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued December 7, 1982

April 18, 1984.

Unpublished Order Not To Be Cited Per Circuit Rule 35

Before

Hon. William J. Bauer, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Walter E. Hoffman, Senior District Judge*

MORTON L. MINSKY, Individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

No. 82-1972 vs.

AUTO DRIVEAWAY COMPANY, et al,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 81 C 5165
Susan Getzendanner, Judge.

ORDER

Plaintiff, Minsky, appeals from the order of the District Court dismissing plaintiff's complaint for failure to state a claim. In this appeal, plaintiff contends that the District Court's reliance on *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), in dismissing the complaint is illfounded.

The corporate defendants, Auto Driveaway Company (Auto Driveaway), AAAcon Transport, Inc. (AAAcon),

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* Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

and Nationwide Auto Transporters, Inc. (Nationwide), provide casual automobile driveaway services and are subject to the juurisdiction of the Interstate Commerce Commission (ICC). The individual defendants are current or former employees of the corporate defendants. The companies transport vehicles by having them driven, under their own power, by employed "casual" drivers who are non-professional drivers retained from among the general public.

In 1974, the companies submitted a proposal for collective ratemaking to the ICC, *see* 49 U.S.C. § 10706, which was finally denied in January 1979. During the period of 1974 to 1979, each of the companies submitted individual rates to the ICC which became effective thirty days after submission without any affirmative action on the part of the ICC.

On September 29, 1980, a federal grand jury indicted the three companies, charging that they had engaged in a combination and conspiracy to fix rates for the casual automobile driveaway services in violation of the antitrust laws. AAAcon plead *nolo contendere* to the charges and was fined $150,000, Nationwide plead guilty and was fined $100,000, and Auto Driveaway was found guilty by a jury and fined $100,000.

On September 14, 1981, plaintiff brought this class action against defendants based on the same conduct which was the subject of the criminal indictment. Plaintiff is seeking treble damages for violation of sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1, 2, and section 4 of the Clayton Act, 15 U.S.C. § 15. On November 30, 1981, defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b) on the grounds that the ICC had exclusive jurisdiction over any dispute related to rates and that defendants' compliance with the published tariffs was a defense to plaintiff's claims. On May 24, 1982, the District Court dismiss the complaint for failure to state a claim upon which relief my be granted. In a minute order the court stated:

> The court grants defendants' motion to dismiss that he has any legal right to a rate lower than be granted. . . . Plaintiff has not and cannot show that he has any legal right to a rate lower than that approved by the ICC. In the absence of a legal right, there is no legal injury. See Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922), and Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1944) [sic]. . . .

Keogh involved an antitrust action by a shipper against rail carriers. The rail carriers established uniform rates which were then submitted to the ICC and approved after hearings. The Supreme Court, in a unanimous decision, held that the plaintiff could not recover under the antitrust laws. Justice Brandeis, writing for the Court, stated:

> [U]nder the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. . . . It does not, however, follow that Keogh, a private shipper, may recover damages under § 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed. . . .
>
> A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce. . . . If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. . . .
>
> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this

> rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

260 U.S. at 161-63.

The sole question in this appeal is the continued validity of *Keogh*. Plaintiff argues that *Keogh* is no longer valid law and thus dismissal was improper.

Plaintiff's argument that *Keogh* can no longer be followed is unconvincing. Even though the Supreme Court has not recently expressly reaffirmed the principles established in *Keogh*, it has favorably referred to *Keogh* on several occasions. *See, e.g., McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 451 (1972). This Circuit also has continued to recognize *Keogh* as valid law. *See Board of Trade* v. *Interstate Commerce Commission*, 646 F.2d 1187, 1193 (7th Cir. 1981); *Aero Trucking, Inc.* v. *Regal Tube Co.*, 594 F.2d 619, 622 (7th Cir. 1979). *See also Indiana Harbor Belt Railroad Co.* v. *United States*, 510 F.2d 644 649 (7th Cir.), *cert. denied*, 422 U.S. 1042 (1975); *Danna* v. *Air France*, 463 F.2d 407, 409 (7th Cir. 1972). Likewise other Circuits have continued to recognize *Keogh* for the principles it established. *See City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *Essential Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121-22 (3d Cir. 1979); *Cleary* v. *Chalk*, 488 F.2d 1315, 1324, n.63 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974). *See also Chicago & North Western Railroad Co.* v. *Union Packing Co.*, 514 F.2d 30, 33 (8th Cir 1975).

Keogh is still valid law and it was proper to apply it to this case. A tariff that is filed with the ICC and which becomes effective is the legal rate and establishes the legal rights of the parties until it is determined by

the ICC to be unreasonable or discriminatory. A customer of a carrier, who was charged the filed rate, *cannot* maintain an antitrust suit against the carrier for an alleged conspiracy in setting the rate.

For the reasons discussed above, the order of the District Court dismissing plaintiff's complaint for failure to state a claim upon which relief may be granted is AFFIRMED.

STATUTES INVOLVED

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, states:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district court in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 5a of the Reed-Bulwinkle Act of June 17, 1948, 62 Stat. 472, 49 U.S.C. § 5b, states:

> § 5b. Agreements between carriers
>
> • • •
>
> Application to Commission for approval of agreements; rules and regulations
>
> (2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6) of this section) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) of this section should apply with respect to the making and carrying out of such agreement; otherwise the application

shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

* * *

Relief from operation of antitrust laws

(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

Section 5a of the Interstate Commission Act, 90 Stat. 42, 49 U.S.C. § 10706(b), states:

(2) As provided by this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title. The Commission may require

compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

No. 84-457

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MORTON L. MINSKY, individually, and on behalf of all others similarly situated,

Petitioner,

v.

AUTO DRIVEAWAY COMPANY, a Pennsylvania corporation; AAACON AUTO TRANSPORT, INC., a New York corporation; NATIONWIDE AUTO TRANSPORTERS, INC.; a Delaware corporation; HARVEY BLACKMAN; IRVING ZOLA; PAUL ZOLA; RALPH ZOLA; ALLEN F. HERMAN; NEDDIE HERMAN; DAVID L. STEINHAGEN; JOHN F. SOHL; and JOHN WILKINSON,

Respondents.

RESPONDENT AUTO DRIVEAWAY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ANTHONY S. DIVINCENZO
Campbell & DiVincenzo
Suite 5612
Three First National Plaza
Chicago, IL 60602
(312) 443-1915

Attorney for Respondents,
Auto Driveaway Company, John F. Sohl, and John Wilkinson

Pandick Midwest, Inc., Chicago • 454-7600

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QUESTION PRESENTED

Is a shipper injured in his business or property within the meaning of Section 4 of the Clayton Act when he has been charged no more than the effective legal rate, and the Interstate Commerce Commission had jurisdiction to determine whether the rate was reasonable and non-discriminatory?

INDEX

	PAGE
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
I. REVIEW OF THE ISSUE PRESENTED IS NOT WARRANTED	3
A. There Is No Conflict In Controlling Authority	3
B. A Ruling In This Case Will Not Create A Rule Of Law Having Application To Other Cases	4
C. Review Is Inappropriate Because Plaintiff Has Failed To Pursue Administrative Remedies	5
II. THE COURT BELOW FULLY CONSIDERED AND PROPERLY DECIDED THE ISSUE	5
A. Plaintiff Cannot Prove Injury Under The Antitrust Laws	5
B. Developments Since *Keogh* Do Not Undercut The Application Of That Decision To This Case	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

	PAGE
Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966)	9
City of Groton v. *Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981)	3
Essential Communications Systems, Inc. v. *American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121-22 (3rd Cir. 1979)	4
Georgia v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945)	3
Keogh v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922)	3, 4, 6, 7, 8, 9, 10
McLain v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980)	3, 8
United States v. *Borden Co.*, 308 U.S. 188 (1939)	8
United States v. *Western Pacific Railroad Company*, 352 U.S. 59 (1956)	5

Statutes:

Clayton Act § 4, 15 U.S.C. § 15 (1982)	6, 8
49 U.S.C. § 10701 (Supp. III 1979)	5
49 U.S.C. § 10708 (Supp. III 1979)	5, 7
49 U.S.C. § 11701 (Supp. III 1979)	5, 7
49 U.S.C. § 11705 (Supp. III 1979)	5
Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 793	4
Reed-Bullwinkle Act, 62 Stat. 472, 49 U.S.C. § 5b	8

PAGE

Shipping Act of 1916, 75 Stat. 762, 46 U.S.C. §§ 801-842 9

Staggers Rail Act, 94 Stat. 1895, 49 U.S.C. § 10101 *et. seq.* 9

Miscellaneous Authority:

88th Annual I.C.C. Report to Congress (1974) ... 7

H. Rep. No. 1100, 80th Cong. 1st Sess. 5 (1947) 8

No. 84-457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MORTON L. MINSKY, individually, and on behalf of all others similarly situated,

Petitioner,

v.

AUTO DRIVEAWAY COMPANY, a Pennsylvania corporation; AAACON AUTO TRANSPORT, INC., a New York corporation; NATIONWIDE AUTO TRANSPORTERS, INC.; a Delaware corporation; HARVEY BLACKMAN; IRVING ZOLA; PAUL ZOLA; RALPH ZOLA; ALLEN F. HERMAN; NEDDIE HERMAN; DAVID L. STEINHAGEN; JOHN F. SOHL; and JOHN WILKINSON,

Respondents.

Respondents, Auto Driveaway Company, John F. Sohl, and John Wilkinson, request that the petition of Morton L. Minsky for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled case be denied.

STATEMENT OF THE CASE

Respondent-Defendant, Auto Driveaway Company, is engaged in the business of providing casual automobile driveaway services. The casual automobile driveaway industry is regulated by the Interstate Commerce Commission. In approximately 1974, respondents, Auto Driveaway, AAAcon Auto Transport, Inc., and Nationwide Auto Transporters, Inc., filed a joint ratemaking agreement with the Interstate Commerce Commission. The I.C.C. requested certain changes in the agreement. Respondents did not make the requested changes and allowed their application for a joint ratemaking association to lapse.

Respondent Auto Driveaway continued to file individual tariffs with the I.C.C. as required. Those filings were in complete compliance with the procedures established by the I.C.C. No shipper challenged any of respondent's rates as unreasonable or discriminatory. The I.C.C. accepted the tariffs, and the tariffs become effective pursuant to I.C.C. procedures.

In September, 1980, respondents were indicted for engaging in a conspiracy in restraint of trade. Auto Driveaway was convicted of this offense on April 8, 1981.

On September 14, 1981, Petitioner, Morton L. Minsky, a one-time shipper of his automobile, filed a class action under the antitrust laws requesting treble damages, but not injunctive relief. The District Court, finding that petitioner could not prove a legally cognizable injury, dismissed the treble damage action. The United States Court of Appeals for the Seventh Circuit affirmed *per curiam* on April 18, 1984. A Petition For Rehearing was denied on June 11, 1984.

REASONS FOR DENYING THE WRIT

I. REVIEW OF THE ISSUE PRESENTED IS NOT WARRANTED.

A. There Is No Conflict In Controlling Authority.

The Court below upheld the dismissal of plaintiff's treble damage antitrust action because plaintiff could not prove the predicate injury to his business or property. Relying on *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), the Court below found that plaintiff's action was barred because he had no legal right to a rate lower than the rate he was charged. This decision is not in conflict with any controlling authority.

In *Keogh*, this Court held that a private action for treble damages under the antitrust laws was inappropriate when the plaintiff shipper had paid only the effective legal rate. Keogh argued that as a result of a conspiracy in restraint of trade he paid more than a competitive rail freight rate for excelsior and flax tow. However, Keogh was charged no more than the rate filed with the Interstate Commerce Commission. This Court held that I.C.C. approval of the filed rate precluded a showing of injury sufficient to establish a right to treble damages under the antitrust laws.

Keogh was expressly reaffirmed in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945). More recently, this Court, in *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 243 (1980), favorably referred to *Keogh* in stating that a failure to prove injury would limit available antitrust remedies to injunctive relief.

Other Circuit Courts of Appeal have consistently held, in suits by shippers involving a rate within the jurisdiction of the I.C.C., that *Keogh* barred a private treble damage action. *See, City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921,

929 (2d Cir. 1981); and *Essential Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121-22 (3rd Cir. 1979).

Petitioner cites no conflicting decision involving rates within the jurisdiction of the Interstate Commerce Commission.

B. A Ruling In This Case Will Not Create A Rule Of Law Having Application To Other Cases.

Plaintiff, recognizing the overwhelming authority supporting the decisions below, requests that *Keogh* and an unbroken line of authority stretching back 60 years be overturned. However, this case is not appropriate for the re-evaluation of *Keogh*. Review of this case will affect few, if any, other litigants, and will provide no guidance for either motor carriers or shippers subject to current I.C.C. regulation.

Plaintiff specifically notes recent Congressional efforts to deregulate common carriers. Admittedly, Congress substantially altered the I.C.C.'s regulatory power over motor carriers by passage of the Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 793. Since passage of that Act, motor carriers and shippers are faced with a regulatory scheme entirely different from the regulatory scheme in effect at the time of the filing of the rates challenged by plaintiff in this case.

These recent changes in the I.C.C. regulatory scheme do not impact the resolution of this case. Plaintiff challenges conduct that occurred entirely prior to the 1980 amendments to the Interstate Commerce Act. As a result, any decision in this case will offer no guidance for carriers or shippers subject to the current regulatory scheme. This case is the proverbial "White Elephant" involving questions of no current importance. For that reason, employing this case as a vehicle to re-evaluate *Keogh* would be inappropriate.

C. Review Is Inappropriate Because Plaintiff Has Failed To Pursue Administrative Remedies.

By passage of the Interstate Commerce Act, before the 1980 Amendments, Congress created a self-contained regulatory scheme for control of rates. Under that scheme all rates had to be reasonable, 49 U.S.C. § 10701 (Supp. III 1979) (amended 1980). The I.C.C. had authority to investigate rates, 49 U.S.C. §§ 10708 and 11701 (Supp. III 1979) (amended 1980); to order the suspension of rates, 49 U.S.C. § 10708 (Supp. III 1979) (amended 1980); and to order reparations in favor of shippers who paid more than a reasonable rate, 49 U.S.C. § 11705 (Supp. III 1979) (amended 1980). This structure permitted the orderly consideration of rates by the I.C.C. The I.C.C., which was best able to address the complex issues raised in a challenge to rates, was given jurisdiction to determine the legality of rates. These considerations have led this Court to require submission of rate related issues to the appropriate administrative agency in the first instance. See, *United States* v. *Western Pacific Railroad Company,* 352 U.S. 59 (1956).

In this case, plaintiff seeks treble damages under the antitrust laws for conduct which was entirely within the scope of I.C.C. regulation. However, the plaintiff has utterly failed to pursue those remedies available to him before the I.C.C. Plaintiff has also failed to seek an I.C.C. ruling on the issues raised by plaintiff's rate challenge. Plaintiff's inaction renders review of the decision below inappropriate.

II. THE COURT BELOW FULLY CONSIDERED AND PROPERLY DECIDED THE ISSUE.

A. Plaintiff Cannot Prove Injury Under The Antitrust Laws.

Underlying plaintiff's claim is the mistaken belief that treble damages are the only available antitrust remedy whenever a conspiracy in restraint of trade is found to exist. To the

contrary, the antitrust laws provide for injunctive relief as well as criminal sanctions. In fact, treble damages are permitted only upon the showing of a legally cognizable injury. Clayton Act § 4, 15 U.S.C. § 15 (1982). Here, as the Court below held, plaintiff cannot, as a matter of law, prove such injury.

Congress replaced unfettered competition among common carriers with I.C.C. regulation of carrier rates through passage of the Interstate Commerce Act. Thereafter, a shipper was entitled to a just, reasonable, and non-discriminatory rate. For that reason, the antitrust laws, with their mandate for competition, and the Interstate Commerce Act appeared to conflict. This Court reconciled those statutes in *Keogh*. That reconciliation prohibited treble damages when a shipper paid no more than the legal rate. As Justice Brandeis stated:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

260 U.S. at 161-63.

Keogh controls this case. Plaintiff admittedly paid the effective tariff—no more and no less. The effective tariff was the legal rate until found procedurally or substantively unlawful by the I.C.C. Since the I.C.C. has never set aside the challenged rates, plaintiff paid the only rate to which he had a legal right. Having paid the rate to which he was entitled, plaintiff has suffered no antitrust injury.

Plaintiff attempts to distinguish *Keogh* by claiming that *Keogh* applies only to rates formally approved after full hearings by the I.C.C. This position ignores the nature of the Congressionally approved regulatory scheme. The lack of a hearing does not mean the lack of I.C.C. approval. Under the regulatory scheme in effect prior to 1980, the I.C.C. could investigate any motor carrier rate filed with it and could on its

own initiative suspend that rate, 49 U.S.C. §§ 10708 and 11701 (Supp. III 1979) (amended 1980). As a result, the I.C.C. has in the past fully investigated numerous motor carrier rates without protest by shippers. *See, e.g.,* 88th Annual I.C.C. Report to Congress (1974).

Incredibly, plaintiff's position would reward those shippers who choose to ignore I.C.C. procedures. By not challenging a filed tariff, a shipper can avoid an I.C.C. hearing, thereby, in plaintiff's view, preserving his antitrust claims. This interpretation of *Keogh* would turn the regulatory scheme established by Congress on its head. Contrary to Congressional intent, the courts rather than the I.C.C. would be required to determine the legality of motor carrier rates. Under such a system, the I.C.C. would no longer function as the regulator of rates as intended by Congress.

Plaintiff also seeks to distinguish *Keogh* by arguing that defendants "fraudulently" filed their tariffs with the I.C.C. This argument has been raised for the first time in this Court. Plaintiff did not allege fraudulent filing in its complaint and did not otherwise raise the issue before the District Court or the Seventh Circuit. Nothing in the record supports this new claim. Even if there were merit to plaintiff's claim, the I.C.C. in the first instance should decide whether the tariffs involved were filed in accordance with the proper procedures. For these reasons, it is singularly inappropriate to raise this question at this time.

B. Developments Since *Keogh* Do Not Undercut The Application Of That Decision To This Case.

In an effort to avoid the dictates of *Keogh*, plaintiff argues that post-*Keogh* developments have undercut the rationale of that decision. To the contrary, *Keogh* applies with full force to the conduct challenged in this case because that conduct predates Congressional deregulation of motor carriers. While post-1980 deregulation of motor carriers and post-1976 deregu-

lation of railroads may have altered the future application of *Keogh*, this is not the appropriate case to address those issues. This case involves essentially the same regulatory scheme which this Court reconciled to the antitrust laws in *Keogh*.

The plaintiff argues that the passage of the Reed-Bullwinkle Act in 1948, 62 Stat. 472, 49 U.S.C. § 5b, established the only acceptable method of obtaining antitrust immunity for joint ratemaking. Citing *United States* v. *Borden Co.*, 308 U.S. 188 (1939), plaintiff suggests that activities outside the scope of an express exemption are actionable under the antitrust laws. Respondent does not disagree with this broad statement. However, respondent believes that not all forms of relief are automatically available to plaintiff. Plaintiff must still satisfy the requirements of Section 4 of the Clayton Act and prove injury in order to be entitled to treble damages. *McLain, supra* at 243. Plaintiff cannot do so here.

The issue in this case is whether treble damages are available, and not whether the antitrust laws apply to defendant's conduct. It must be emphasized that the policies of the antitrust laws have been fulfilled in this instance. The challenged conduct was the subject of a criminal proceeding and defendant has been fined and enjoined from engaging in such conduct in the future. Plaintiff's action will not further the enforcement of the antitrust laws.

In addition, the Reed-Bullwinkle Act did not expand the availability of treble damages. The legislative history of the Reed-Bullwinkle Act demonstrates that, apart from providing an immunity for joint ratemaking agreements approved by the I.C.C., Congress intended that the antitrust laws "apply with full force and effect to carriers, *so far as they are now applicable. . . .*" *See, e.g.*, H. Rep. No. 1100, 80th Cong. 1st Sess. 5 (1947) (emphasis supplied). The Reed-Bullwinkle Act was passed to expand the railroads' protection from governmental antitrust actions by allowing the I.C.C. to immunize such control if certain safeguarding procedures were followed. In

view of this avowed purpose, it is non-sensical to suggest that Congress intended to overrule *Keogh* which had been in effect for 25 years.

Similarly, plaintiff's reliance on the Staggers Rail act of 1980 is misplaced. 94 Stat. 1895, 49 U.S.C. § 10101 *et seq.* That statute applied only to rail carriers and not to motor carriers. More importantly, plaintiff does not challenge any conduct occurring after 1980. The impact of deregulation is simply not raised by this case.

The plaintiff also argues that *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966) holds that treble damages are entirely collateral to any available administrative remedies. However, *Carnation* did not even mention, let alone overrule *Keogh.* Instead, *Carnation* presented the issue whether the Shipping Act of 1916, 75 Stat. 762, 46 U.S.C. §§ 801-842, totally displaced the antitrust laws. That issue is not involved in this case since the antitrust laws have already brought to bear against defendant. In addition, the Federal Maritime Commission's regulatory powers addressed in *Carnation* were substantially different than regulation by the I.C.C. involved in this case.

CONCLUSION

Plaintiff is not entitled to treble damages because he can never demonstrate an injury legally cognizable under the antitrust laws. This case is an inappropriate case in which to re-evaluate *Keogh*.

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

ANTHONY S. DIVINCENZO
Campbell & DiVincenzo
Suite 5612
Three First National Plaza
Chicago, IL 60602
(312) 443-1915

Attorney for Respondents,
Auto Driveaway Company, John F. Sohl, and John Wilkinson

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MORTON L. MINSKY, Individually and on behalf of all others similarly situated,

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v.

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Respondent.

REPLY BRIEF OF PETITIONER

MARK R. ORDOWER
MARK R. ORDOWER & ASSOCIATES
435 North LaSalle Street
Chicago, Illinois 60610
312/822-0008

ROBERT A. HOLSTEIN
HOLSTEIN, MACK & ASSOCIATES
30 North LaSalle Street
Chicago, Illinois 60602
312/641-3400

KENNETH R. SIEGAN
JOEL D. WEISMAN
SIEGAN & WEISMAN, LTD.
33 North Dearborn Street
Chicago, Illinois 60602
312/782-1212

FREDERIC F. BRACE, JR., P.C.
BRACE & O'DONNELL
332 South Michigan Avenue
Chicago, Illinois 60604
312/347-4400

Attorneys for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

8 pp

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

REPLY ARGUMENT 1

TABLE OF AUTHORITIES

CASES

Atlantic Coast Line Railroad Co. v. *Riss & Co.*, 267 F.2d 659 (D.C. Cir. 1959) 3

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) 2, 4

Keogh v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922) 3

United States v. *Borden*, 308 U.S. 188 (1939) 2

United States v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956) 3

STATUTES

Motor Carrier Act of 1980

94 Stat. 793, Sec. 2 & 3a, 49 USC § 10101 .....1-2, 2-3

94 Stat. 803, Sec. 14(a), 49 USC § 10706 3

IN THE

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MORTON L. MINSKY, Individually and on behalf of all others similarly situated,

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Respondent.

REPLY BRIEF OF PETITIONER

There are two arguments raised in respondents-defendants' brief in opposition which were not addressed in petitioner's-plaintiff's petition for a writ of certiorari. They are addressed herein.

First, defendants contend that "a ruling in this case will not create a rule of law having application to other cases." (Respondents' Brief p. 4.) That is true, defendants reason, because the ICC's regulatory authority over motor carriers was altered subsequent to the time of defendants' price fixing conspiracy by the Motor Car-

riers Act of 1980, Pub. L. 96-296, 94 Stat. 793. If anything, however, a ruling in this case will have greater effect due to these changes.

The instant case involves the issue whether defendants who act outside the established process for obtaining ICC approval of rate-making agreements and collusively set their rates can escape liability for antitrust damages in a civil action. Plaintiff maintained that "[t]he creation of an antitrust exemption for certain rate-making activities implies that rate-making activities outside the exemption are actionable," citing *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966). (Petition, p. 7.) Respondent states that it "does not disagree." (Brief in Opposition, p. 8.)

By amending the procedure by which motor carriers may obtain approval of rate-making agreements through enactment of the Motor Carrier Act of 1980, Congress did not alter the rights of parties who act outside of the regulatory process and collectively set their rates. Therefore, a ruling in this case would be applicable to cases involving activities which fall outside the antitrust exemption contained in the Interstate Commerce Act, as amended by the Motor Carrier Act of 1980.

The amendments to the Interstate Commerce Act contained within the Motor Carrier Act of 1980 militate in favor of granting the petition for writ of certiorari. The 1980 amendments contain two significant changes. First, Congress stated, in part, that it is a goal of our national transportation policy to reduce "unnecessary regulation by the Federal Government" and increase the role of competition in the motor carrier industry. 94 Stat. 793,

Sec. 2 and 3(a). Second, Congress narrowed the types of activities by rate bureaus which are exempt from antitrust scrutiny. 94 Stat. 803-806, Sec. 14(a). Such deregulation indicates that there is an even greater need to further define the interaction between the antitrust laws and the regulatory process.

The second issue raised by the defendants is that review is inappropriate because plaintiff failed to pursue administrative remedies. However, the ICC does not have exclusive primary jurisdiction over plaintiff's claim. Generally, under the doctrine of primary jurisdiction, courts should defer to administrative agencies "whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956). See also *Atlantic Coast Line Railroad Co.* v. *Riss & Co.*, 267 F.2d 659, 660 (D.C. Cir.), *cert. denied*, 361 U.S. 804 (1959). In the instant case, there is no need to defer to the ICC. Plaintiff challenges conduct which is clearly outside the antitrust exemption for ratemaking agreements under the Interstate Commerce Act.* Furthermore, unlike *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), this case does not involve a challenge to rates found to be reasonable by the ICC. Defendants' rates automatically became effective without any kind of determination by the ICC. Under

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* Indeed, the defendants have already been found guilty of a criminal price-fixing conspiracy. It is now merely a question of whether the victims of that conspiracy can recover damages for the injuries they have suffered.

these circumstances plaintiff's right to proceed in court should be deemed to be collateral to any rights he may have had to seek relief before the ICC. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 222, 224 (1966).

Plaintiff's petition for a writ of certiorari should be granted.

MARK R. ORDOWER
MARK R. ORDOWER
& ASSOCIATES
435 North LaSalle Street
Chicago, Illinois 60610
312/822-0008

KENNETH R. SIEGAN
JOEL D. WEISMAN
SIEGAN & WEISMAN, LTD.
33 North Dearborn Street
Chicago, Illinois 60602
312/782-1212

ROBERT A. HOLSTEIN
HOLSTEIN, MACK
& ASSOCIATES
30 North LaSalle Street
Chicago, Illinois 60602
312/641-3400

FREDERIC F. BRACE, JR., P.C.
BRACE & O'DONNELL
332 South Michigan Avenue
Chicago, Illinois 60604
312/347-4400

Attorneys for Petitioner